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In the

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *et al.*, *Petitioners,*

v.

TROY A. ASHMUS, *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES AND COMMONWEALTHS OF MARYLAND, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Court of Appeals err in holding that this action, brought by California death-row prisoners against state officials seeking a preliminary injunction barring them from advocating that California met the requirements of Title 28, Chapter 154 for expedited filing and consideration of capital habeas corpus cases, was not barred by the Eleventh Amendment because it came within the *Ex Parte Young* exception?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

At stake in this case is the ability of each of the fifty states to fulfill its sovereign duty to enforce and protect its criminal judgments through good faith legal advocacy on the part of its Attorney General when those judgments are challenged in federal court on a petition for writ of habeas corpus.

The protection of its citizens through the enforcement of the criminal law is one of the primary sovereign duties of a state. In our federal system, of course, the constitutionality of state criminal judgments may be challenged in federal court on a petition for writ of habeas corpus. *E.g. Ex Parte Royall*, 117 U.S. 241 (1886). Accordingly, the states are often called upon to defend these judgments in federal court, which they do through advocacy by their respective Attorneys General.

At least as much as any other litigant, and perhaps more so in view of their special sovereign status and the subject matter at issue, the states and their citizens have a vital interest in the ability of their Attorneys General to advocate zealously on their behalf in such cases. In the present case, however, an Attorney General of a sovereign state has been enjoined from all good faith advocacy on a complex and highly debatable point of law potentially affecting federal review of a large number of capital convictions.

The interests of the *amici* states accord with those of the petitioners, the California Attorney General and prison officials, in seeking to overturn the injunction in this case, and to restore the Attorney General's ability to make all available legal arguments in defense of California's criminal judgments.

Amici also share a broader interest in this case. Failure to close the breach opened by the Ninth Circuit's expansive

interpretation of the "continuing violation of federal law" requirement of the *Ex Parte Young*, 209 U.S. 123 (1908), exception will undermine to a substantial degree important principles of Eleventh Amendment immunity. State officials could be compelled to respond in federal court to anticipatory claims that otherwise would not even be contemplated. The importance of the states' Eleventh Amendment immunity in our federal system requires that the *Young* exception's requirement of a continuing violation of federal law be construed strictly to insure that what are in reality suits against the states are permitted only where absolutely necessary to protect the supremacy of federal law. The decision of the Ninth Circuit strays far from this principle in holding that a state official violates federal law merely by asserting an intention to invoke an arguably meritorious defense to a potential federal law claim. In addition, the *amici* states have an interest in ensuring that in cases brought under *Ex Parte Young* federal courts award only such relief as is necessary and effectual.

Finally, Maryland and other *amici* death-penalty states also share the petitioners' interest in the implementation of the capital habeas corpus reforms enacted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, 110 Stat. 1217, codified at 28 U.S.C. §§ 2261-2266 (Chapter 154). Whether these reforms will be applied depends on whether a state's system for providing counsel to capital prisoners on state collateral review meets the requirements of the statute. These *amici*, like California, have a compelling interest in being able to litigate this question as effectively as possible, which cannot be done where the Attorney General of a state may be placed under an injunction barring him from even asserting in any court that Chapter 154 applies.

STATEMENT OF THE CASE

On April 24, 1996, the effective date of the AEDPA, Respondent Troy Ashmus, a California prisoner under sentence of death, filed a complaint in the United States District Court for the Northern District of California. Named as defendants were the Attorney General of California, and three California prison officials having custody of that state's capital prisoners. On behalf of himself and other California capital prisoners, Ashmus sought a declaratory judgment that the accelerated filing and review provisions of the Act, codified in new Chapter 154 of Title 28, would not apply to them because California's system of providing counsel for capital prisoners on state collateral review did not meet certain requirements of the Act. *See* 28 U.S.C. § 2265. The District Court granted the relief sought, enjoining the state officials from further advocating in any forum their legal position that Chapter 154 applied. *Ashmus v. Calderon*, 935 F. Supp. 1048 (N.D. Cal. 1996).

On appeal by the state officials from the District Court's grant of preliminary injunctive relief, under 28 U.S.C. § 1292(a)(1), the Ninth Circuit Court of Appeals affirmed, finding that the exception of *Ex Parte Young* applied and thus rejecting the state officials' argument that the Eleventh Amendment barred the suit. The Ninth Circuit also agreed with the prisoners' position on the merits and found that the issuance of injunctive relief was proper to enforce the declaratory judgment. The district court's preliminary injunction was approved "under the current state of California law," this clarification being intended to account for the possibility that California might change its law. *Ashmus v. Calderon*, 123 F.3d 1199, 1209 (9th Cir. 1997).

This Court granted the state officials' Petition for Writ

of Certiorari on December 5, 1997.

SUMMARY OF ARGUMENT

Subject to very limited exceptions, the principles of sovereign immunity embodied in the Eleventh Amendment bar suits in federal court against the states. In the interest of protecting the supremacy of federal law, however, suits for prospective relief against state officials may be allowed under the decision in *Ex Parte Young* where necessary to end a continuing violation of federal law. The Ninth Circuit erroneously found the *Young* exception applicable in the present case so as to permit a highly intrusive injunction barring the state officials from lawful advocacy of their position that California meets the requirements for the applicability of Chapter 154's capital habeas reforms.

The *Young* exception does not apply here. No continuing violation of federal law exists in this case. State officials were merely taking a good-faith legal position on the applicability of a complex statute under circumstances arguably leaving California capital prisoners uncertain as to their best course of action. California officials violated no federal law, however, in taking the position that they did.

Their advocacy of the position that Chapter 154 applied also in no way deprived the prisoners of any federal rights. California capital prisoners are provided with counsel throughout the state unitary review process, which includes collateral review. Regardless whether Chapter 154 applies, the federal habeas corpus statute of limitations does not even begin to run until after the completion of the unitary review process, with the result that at the commencement of the federal habeas review process California capital prisoners will not be compelled to quickly file so-called "bare-bones" petitions or risk forfeiting their right to federal habeas review.

Absent any violation of federal law or threat to federally protected rights, no justification exists for the intrusion into state sovereignty represented by the maintenance of this action in federal court. This litigation has had a substantial impact on California's sovereignty. The state's Attorney General has been subjected to a coercive injunction barring him from advocating in any court on behalf of the citizens of the state in defense of the state's capital criminal judgments. Such an injunction represents a highly offensive intrusion on sovereignty.

The injunction was unnecessary and ineffectual, as well as excessive. Whatever legitimate interest in certainty was thought to be served by the injunction is better served by the *stare decisis* effect of appellate court rulings on the merits in individual cases, as developed in the ordinary course of litigation. The injunction is ineffectual in serving the certainty interest asserted. All it prohibits is the assertion of one party's legal position. The applicability *vel non* of Chapter 154 will remain a legal issue to be considered by California federal district courts hearing individual capital habeas petitions.

For all these reasons, the Ninth Circuit erred in finding the *Ex Parte Young* exception applicable and in extending federal jurisdiction to this case in the face of the state officials' Eleventh Amendment objections.

ARGUMENT

THIS ACTION DOES NOT COME WITHIN THE *EX PARTE YOUNG* EXCEPTION TO THE STATE'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

A. Introduction

1. Like the other forty-nine sovereign states of this Union, the State of California cannot ordinarily be sued by

its own citizens in federal courts without its consent. *Hans v. Louisiana*, 134 U.S. 1, 20 (1890).[1] Through prolonged and vigorous debate, this Court has consistently affirmed that this principle of sovereign immunity is an inherent part of our constitutional structure that is embodied in the Eleventh Amendment. *E. g., Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2033 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1122 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985). Other than an express waiver by the state, or a clear abrogation of a state's immunity by Congress pursuant to the Fourteenth Amendment, *id.*, 473 U.S. at 238; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), neither of which is at issue here, the only exception to a state's Eleventh Amendment immunity is that provided by the decision in *Ex Parte Young*, 209 U.S. at 160.

The question in this case is whether *Ex Parte Young* applies so as to permit Ashmus's suit against the Attorney General of California and certain officials of California's prison system seeking injunctive relief to preclude the application to him and other condemned prisoners of the provisions of Title 28, Chapter 154 of the United States Code relating to capital habeas corpus petitions. The Ninth Circuit Court of Appeals held that the *Ex Parte Young* exception applied, and affirmed the District Court's ruling

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[1] This immunity normally extends to suits against state officials sued in their official capacity. Such suits are considered suits against the state itself, subject to the exception of *Ex Parte Young*, discussed *infra*, at p. 8. *See, e.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462-63 (1945).

on the merits and its award of injunctive relief. *Ashmus*, 123 F.3d at 1208-09.

The Ninth Circuit's decision was wrong. That court reflexively applied *Young* principally because Ashmus claimed a threat to his federally protected rights. In so doing, the Court of Appeals gave insufficient consideration to the purposes and limitations of the *Young* exception, especially considering the vaporous nature of the alleged violation of federal law and the highly intrusive, yet ineffectual, injunctive relief granted.

2. *Ex Parte Young* involved a suit against the Attorney General of Minnesota to enjoin enforcement of onerous criminal sanctions under a state statute setting railroad rates so low as allegedly to amount to an unconstitutional taking. This Court held the suit was not barred by the Eleventh Amendment. 209 U.S. at 160. *Ex Parte Young* has been relied on ever since to except from the scope of Eleventh Amendment immunity, "certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. at 2034. However, it is clear that *Ex Parte Young* does not apply to every suit against state officials for prospective relief. As this Court very recently stated in *Idaho v. Coeur d'Alene Tribe*:

> To interpret *Young* to permit a federal court-action to proceed in every case where declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle, reaffirmed just last Term in *Seminole Tribe*, that Eleventh Amendment immunity represents a real limitation of a federal court's federal-question jurisdiction. The real interests

> served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction.

117 S. Ct. at 2034.

Applying this reasoning, the Court held that the *Young* exception would not apply to permit a suit against state officials that was in essence a suit against the state itself to quiet title to land, "which implicates special sovereignty interests." 117 S. Ct. at 2040, 2043. This Court also declined to apply *Young* in *Seminole Tribe of Fla. v. Florida*, where to do so would have permitted a suit to enforce Florida's obligation to negotiate with an Indian tribe under the Indian Gaming Regulatory Act. The Court characterized the case before it as "sufficiently different from that giving rise to the traditional *Ex Parte Young* action so as to preclude the applicability of that doctrine." 116 S. Ct. at 1132.

That there are fundamental limitations on the scope of the *Young* exception has been clear at least since *Edelman v. Jordan*, 415 U.S. 651, 666 (1974), in which this Court held that the relief available in an *Ex Parte Young* action is limited to prospective relief. The primary reason for this basic limitation is not that such a limitation is implicit in the rationale of *Ex Parte Young*, but because it is the necessary result of balancing the states' sovereignty interests with the need to protect the supremacy of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).[2] *See also Pennhurst State*

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[2] In *Green*, this Court stated: "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but

School & Hospital v. Halderman, 465 U.S. 89, 102-03 (1984)(holding *Young* exception does not permit suit in federal court to redress violations of state law; noting that although *Young* "has survived," it has "not been provided an expansive interpretation.").

Indeed, it has long been settled that the *Ex Parte Young* exception only applies in limited situations, where an exception to the Eleventh Amendment is "absolutely necessary" to protect the supremacy of federal law. *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926), *quoted in Younger v. Harris*, 401 U.S. 37, 45 (1971).

In short, *Ex Parte Young* does not automatically apply simply because the complaint alleges a violation of federal law and requests prospective relief. This Court's decisions, suggest that what is required is a careful inquiry into: 1) the nature of the alleged violation as to which federal law is sought to be vindicated, i.e., is a substantial violation of federal law alleged? 2) the impact on the sovereignty interests of the state, i.e., is the relief sought justified in light of the particular intrusion into state sovereignty? and 3) the nature and scope of the relief sought, i.e., will the relief sought be effective to end the allegedly continuing violation thereby vindicating the supremacy of federal law without unnecessarily infringing on the state's sovereignty?

All of these considerations are implicit in the formulation of the *Young* exception itself in light of its

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the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." 474 U.S. at 68 (citations omitted).

purposes and the limitations which pervade its constitutional context. As Justice Powell stated for the Court in *Pennhurst*:

> Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. . . .
>
> The Court has also recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States.

465 U.S. at 105. The decision of the Ninth Circuit either ignored these considerations or evaluated them incorrectly based on a presumption that *Young* would automatically apply.

B. There was no violation of federal law to be remedied in this case.

The first and most fundamental requirement for the application of the *Young* exception is a substantial continuing violation of federal law by state officials that the prospective relief sought is designed to end. Where there is no ongoing violation of federal law to be stopped, there is no justification for infringing on the sovereignty of the state. *See, e.g., Green v. Mansour*, 474 U.S. at 72-73.

In the present case, the Ninth Circuit properly acknowledged the requirement of a continuing violation of federal law. However, the court purported to find such a continuing violation of federal law in the mere assertion by state officials that they believed the provisions of Chapter 154 applied even though California's unitary system allegedly did not meet the requirements of § 2261(b), (c) or 2265. This was held to violate the prisoners' rights to habeas corpus review. *Ashmus*, 123 F.3d at 1204-05.

Read in the best light, the Ninth Circuit's conclusion was that the state's assertion of the applicability of Chapter 154 in the prisoners' upcoming habeas cases, placed these presumptively unrepresented death-row inmates in a Catch-22: they could either anticipate the state's Chapter 154 defenses and file a timely, but substantively deficient petition without the benefit of counsel, or they could take their chances on the applicability of Chapter 154, await the appointment of counsel and file a substantively complete but potentially untimely petition. The Ninth Circuit's conclusion was wrong legally and factually.

First, the Ninth Circuit's decision is fundamentally wrong legally. By no stretch of the imagination can the state officials' mere announcement of a good faith intention to raise legal defenses provided under Chapter 154 to the prisoners' anticipated habeas corpus petitions be considered a violation of federal law of any kind, much less of the kind sufficient to justify invocation of the *Young* exception to the Eleventh Amendment. *See Booth v. State of Maryland*, 112 F.3d 139, 143 (4th Cir. 1997). *Cf. Worcester County Trust Co. v. Riley*, 302 U.S. 292, 298-99 (1937)(*Young* not applicable to permit interpleader actions against states claiming right to tax decedent as domiciliary on theory that suit necessary to prevent violation of federal right to avoid double taxation). *See also Cory v. White*, 457 U.S. 85, 86 (1982). Certainly, a cause of action does not exist merely to resolve uncertainty in the application of law. *See Younger v. Harris*, 401 U.S. at 42.

The Ninth Circuit's decision attempts to avoid these common sense truths by framing the issue as if the state officials were asserting an intention to raise Chapter 154 defenses despite the clear inapplicability of Chapter 154. *Ashmus*, 123 F.3d at 1204. However, the record is devoid of any claim, evidence or finding that the state officials were

acting in bad faith in stating their position concerning Chapter 154. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 490 (1965)(permitting injunctive action to restrain threatened prosecution alleged to be in bad faith). More fundamentally, this analysis collapses from internal contradiction. If, in fact, it were clear Chapter 154 did not apply to California, the prisoners would not be under any compulsion to meet its accelerated filing deadlines, no matter how forcefully the state asserted an intention to advance its defenses. If the applicability of Chapter 154 is sufficiently debatable that the prisoners feel compelled to meet its deadlines, in case it should be found to apply, there can be nothing unlawful about the state officials' asserting that they will raise Chapter 154 as a defense.

The Ninth Circuit's holding that state officials violate federal law by simply announcing an intention to rely on allegedly inapplicable defenses could have far-reaching, adverse consequences. Under the Court of Appeals' rationale, the *Ex Parte Young* exception could be relied upon in other types of anticipatory suits against state officials seeking to foreclose anticipated federal law defenses to potential actions, at least wherever the plaintiff alleges that the uncertainty caused by the prospect of a successful defense may cause him to forego some asserted federal right. For instance, a convicted state prisoner, before filing for state collateral review, might seek a federal court ruling on the merits of a constitutional claim that a confession was involuntary by suing state officials for an injunction to prevent them from arguing the contrary. Potential 42 U.S.C. § 1983 plaintiffs might sue for a declaratory judgment to establish that the defense of qualified immunity would not be available. A welfare recipient contemplating an administrative claim for back benefits could attempt to foreclose state officials from

contesting his claim by contending that he was ineligible.

That such suits would be few cannot be assumed, given the many federal programs administered by state officials and the creativity of the bar. And although core jurisdictional and equitable principles might readily trim back novel claims growing out of the Ninth Circuit's decision in *Ashmus* once they arise, there are Eleventh Amendment interests at stake that caution against planting the seeds in the first place.

This Court has repeatedly rejected the notion that a state loses its Eleventh Amendment protections simply by participating in a federally funded program, such as AFDC, *see, e.g., Atascadero*, 473 U.S. at 246; *Edelman*, 415 U.S. at 673, or simply because issues of federal law are at stake, *e.g. Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 322 (1933). Treating the assertion of a defense as a violation of federal law would invite an end-run around these strict rules. The Court has also recognized that the Eleventh Amendment protects the states not just from being subject to the judgment of a federal court without their consent, but also from the interference of being brought into federal court on the complaint of private parties. *See, e.g., Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Finding a violation of federal law wherever an arguably invalid defense is asserted could subject the states to the need to respond to many more lawsuits in federal court.

Important Eleventh Amendment immunity principles are therefore threatened by the Ninth Circuit's expansive interpretation of the "continuing violation of federal law" requirement of the *Young* exception. To preserve the constitutional role of the states' Eleventh Amendment immunity in our federal system requires that the *Young*

exception be narrowly applied. Such suits are proper only where truly necessary to protect the supremacy of federal law. Therefore, the *Young* exception must be applied only where there is a real "continuing violation of federal law," and not, as in this case, where there is only a good-faith assertion of a potential legal defense.

In addition to the foregoing legal error, the Ninth Circuit was wrong on the facts. As persuasively argued in the Petition for Writ of Certiorari filed by the California state officials and the Brief of Amicus Curiae Criminal Justice Legal Foundation in Support of the Petition for Writ of Certiorari, California death row inmates are simply not placed in the Catch-22 the Court of Appeals envisioned. California has a unitary system of post-conviction review, in which collateral review and direct review proceed simultaneously. *See Ashmus v. Calderon*, 935 F. Supp at 1070 (decision of district court below describing California's unitary review system). Regardless of any delay in initial appointment, counsel is provided for capital prisoners for this process. The federal habeas corpus time clock, whether 180 days under § 2263 or one year under § 2244(d), does not even begin to run until the unitary review process has been completed.

The real source of the Catch-22 the Ninth Circuit feared was not delay in the appointment of state unitary review counsel, but delay in the appointment of counsel to prepare a prisoner's federal habeas corpus petition after the federal habeas corpus clock has started to run. But any such delay is not the responsibility of the state officials. Counsel in federal habeas corpus cases are appointed by the federal courts. 21 U.S.C. § 848(q); *McFarland v. Scott*, 512 U.S. 849, 854 (1994). Likewise, it has nothing to do with any delay or other infirmity in the appointment of counsel for state unitary review proceedings that allegedly renders

California ineligible under Chapter 154. Finally, as a matter of practicality, delay in the appointment of federal habeas corpus counsel would be rendered harmless in any event by the fact that before the federal habeas clock even starts to run, state unitary review proceedings would have been completed with the assistance of counsel. These proceedings would have included a thorough review of all collateral issues that could immediately be translated into a substantive federal habeas corpus petition.

In sum, because the alleged "continuing violation of federal law" in this case was non-existent in fact, and was at best, theoretical only, no intrusion on state sovereignty was warranted to vindicate the supremacy of federal law.

C. The intrusion into state sovereignty in this case was significant.

In *Idaho v. Coeur D'Alene Tribe*, 117 S. Ct. at 2040, this Court closely examined the impact of the challenged law-suit on the sovereignty of the state before deciding that *Ex Parte Young* did not extend far enough to permit the action. Likening the suit to an action to quiet title to land, implicating core issues of sovereignty, the Court noted that "if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable." 117 S. Ct. at 2043.

Obviously, the present case does not involve a question of jurisdiction over state lands and waters. But, like *Idaho*, the present case does involve core state functions which raise important issues of federalism: the enforcement of criminal law, *see City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983), and the ability of a state's chief lawyer to

advocate for the enforcement of the state's criminal judgments in conformance with his constitutional duty, *see Rizzo v. Goode*, 423 U.S. 362, 380 (1976).

The present action directly infringes on the sovereignty of the State of California in both of these important areas. Certainly, the impact on the state's sovereignty in this case is far greater than that which occurred in *Edelman*, where state welfare officials were simply compelled to conduct a federally funded program in accordance with federal mandates. It is not contended, of course, that *Ex Parte Young* is categorically inapplicable in the present case due to the nature of the effect on state sovereignty. *Young* itself involved an injunction to prevent a state's attorney general from enforcing the state's criminal law. But, on the facts of that case, such an action was necessary to vindicate constitutional rights.

Despite the importance of the state's sovereignty concerns, the Ninth Circuit dismissed the state's assertions of its sovereign interests as matters "of timing, not of substance," and found them trivial simply because the issue sought to be resolved in this case could be resolved in litigation of individual habeas corpus petitions. *See Ashmus*, 123 F.3d at 1205 ("Permitting this action to proceed despite California's Eleventh Amendment immunity defense ... will have little, if any, impact on the State's sovereign interests.").[3] The Ninth Circuit's decision in this regard

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[3] The Ninth Circuit also cites a section of Justice Kennedy's *Idaho* opinion that was not part of the opinion of the Court for the proposition that "efficiency and fairness concerns" affect the determination whether to apply *Young*. *Ashmus*, 123 F.3d at 1205-06, *citing Idaho*, 117 S. Ct. at 2306. *Amici* believe the Ninth Circuit misread this separate portion of the opinion. Justice Kennedy did not assert that concerns of judicial economy

mistakenly equates the adverse impact of a particular lawsuit on a state's sovereignty interests with the question whether the same legal questions could legitimately be raised in another way. Here, the fact that California could be forced to defend its criminal judgments in one or more habeas corpus actions in which the question of Chapter 154's applicability may be raised, does not mean that California has no sovereignty interest in avoiding an additional, preliminary coercive lawsuit addressing this issue.

The Ninth Circuit's decision also ignores the broad scope of the injunction it affirmed, which prohibits the California Attorney General in any capital habeas case from advocating that Chapter 154 applies. No such limitation would follow under principles of *stare decisis* even if California were to lose the issue of Chapter 154's applicability on the merits in litigation of an individual habeas petition. The Attorney General would be free in subsequent cases to argue the inapplicability of the prior rulings on a variety of grounds, to the extent the trial court permits, and at least to preserve the issue for appeal.

In sum, this suit and the injunctive relief awarded, barring the state's officers from good faith legal advocacy in the state's interest, represent a severe intrusion on the sovereignty of the state, especially when compared to the absence of any real alleged "violation of federal law."

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can override Eleventh Amendment immunity. The Court has stated: "Policy, no matter how compelling, is insufficient, standing alone, to waive [sovereign] immunity." *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986)(dealing with federal government's immunity from interest on judgment), *quoted in Booth v. State of Maryland*, 112 F.3d at 146.

D. The injunctive relief awarded in this case was excessive, unnecessary and ineffectual for the intended purpose.

The concerns of federalism inherent in the notion that the Eleventh Amendment embodies our constitution's recognition of broad sovereign immunity for the states dictate that a court be particularly cognizant of traditional equitable principles, *see, e.g., Younger v. Harris*, 410 U.S. at 42-43; *Samuels v. Mackell*, 401 U.S. 66, 73 (1971); *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952), in determining what relief is permissible in an action brought under the *Young* exception. Those traditional equitable principles were ignored by the Ninth Circuit. The injunction it affirmed was unnecessary, excessive and ineffectual. Ashmus's complaint requesting such relief should not have been permitted to proceed past the barrier of the Eleventh Amendment.

The only attention given by the Ninth Circuit to the question of the propriety of the injunctive relief it was affirming was to say: "Nor did the district court err in determining that an injunction was necessary to effectuate its declaratory judgment. Had the district court not issued the injunction, California would have been free to assert in other federal and state proceedings the same position it asserts in this case." *Ashmus*, 123 F.3d at 1209.

While it is true that the Declaratory Judgment Act provides that a court may issue injunctive relief where necessary to effectuate a declaratory judgment, 28 U.S.C. § 2202, injunctive relief certainly does not follow a declaratory judgment as a matter of course. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974)(recognizing propriety of injunctive and declaratory relief subject to different standards; holding error to deny declaratory relief solely

because injunctive relief unavailable in absence of showing of irreparable injury). Thus, even if declaratory relief were proper in this case, which is not conceded, it by no means follows that the injunction was proper.

The preliminary injunction here, even as clarified by the Ninth Circuit, *Ashmus*, 123 F.3d at 1209, was not proper relief in a case brought under the *Young* exception because it was at the same time overly intrusive, unnecessary and ineffectual to accomplish its intended purpose. As restated by the Ninth Circuit, the injunction provided "that California is enjoined from asserting in any state or federal court that it qualifies for the benefits of Chapter 154 under the current state of California law in cases involving habeas corpus claims of state prisoners under sentence of death." *Id.*[4]

First, in prohibiting the state's Attorney General from advancing good faith legal arguments in court proceedings in which he has a constitutional duty to defend the state's interest, the injunction represents an obvious and significant intrusion on the sovereignty of the state. Such an intrusion would have to be considered grossly excessive if not absolutely necessary and effectual.

This injunction cannot even be considered necessary, however. The only purpose to be served by it is to relieve California death row prisoners of uncertainty whether Chapter 154 will apply to their future habeas petitions. The only significant difference such fore-knowledge would

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[4] Interestingly, the Ninth Circuit has dropped the pretense that the injunction is against the defendant state officials, not the state itself. Regardless of the applicability of the *Young* exception to a suit against state officials, a suit against a state itself is still barred under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. at 1132.

make would be to allow the prisoners an extra six months to file their petitions. As argued above, *see supra* at 15-16, this extra six months is unnecessary. The prisoners would have been represented by counsel throughout the preceding unitary review process, during which all collateral issues that could be raised on federal habeas would have been explored. An additional six months would not be necessary to draft a substantive habeas corpus petition.

Finally, assuming the intent of the injunction is to relieve the prisoners of uncertainty whether Chapter 154 applies, it is ineffectual. The injunction itself does nothing to resolve the issue of the applicability of Chapter 154; it simply prevents state officials from speaking on that issue. *Cf. Death Row Prisoners of Pennsylvania v. Ridge*, 106 F.3d 35 (3d Cir. 1997)(court accepts Pennsylvania officials' declaration that requirements of § 2261 not met). Of course, federal district courts in California will be bound by the ordinary *stare decisis* effect of the *Ashmus* decision, but the same would have been true following a decision on the merits in any single habeas corpus case without resort to a coercive injunction barring advocacy of the state's interest by the Attorney General.

The injunction *per se* also does not preclude a district court itself from raising questions of the applicability of Chapter 154 in the course of deciding individual habeas corpus petitions. Indeed, each federal district court hearing a California capital habeas petition would be duty bound to determine what law applied, within the limits of the doctrine of *stare decisis*, regardless of what position the parties take. Thus, at least some degree of uncertainty must remain in spite of the injunction. In these circumstances, the supposed benefits flowing from the Ninth Circuit's "remedy" do not justify the substantial intrusion on California's sovereignty interests that it represents. Such a

remedy is not proper under the *Ex Parte Young* exception to the Eleventh Amendment.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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